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Office of Administrative Law Judges
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Issue Date: 18 July 2006

CASE NUMBER: 2003-LHC-01139

OWCP NUMBER: 14-135247

In the Matter of :

BERNICE SCHUCHARDT (widow of Lawton Schuchardt),
Claimant,

v.

ZIDELL MARINE CORP., FMC CORP., NORTHWEST MARINE IRON WORKS, DILLINGHAM SHIP REPAIR, and WILLAMETTE IRON & STEEL/GUY F. ATKINSON CO.,
Employers,

and

SAIF CORP., ELDORADO INSURANCE CO., INDUSTRIAL INDEMNITY/FREMONT, WAUSAU INSURANCE CO., PINNACLE INSURANCE, and ZENITH INSURANCE CO.,
Insurers.

Before: Paul A. Mapes
Administrative Law Judge

DECISION AND ORDER ON REMAND

This case arises from a claim under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq*. (hereinafter referred to as the "Act" or the "Longshore Act"). In brief, Bernice Schuchardt ("the claimant") alleges that her late husband, Lawton Schuchardt, acquired asbestosis as a result of being exposed to potentially harmful levels of asbestos while working for the defendant shipyards and that the asbestosis contributed to Mr. Schuchardt's death on August 23, 2000.

PROCEEDING BEFORE THE OFFICE OF ADMINISTRATIVE LAW JUDGES

A trial on the merits of the claim was held in Portland, Oregon, on February 24 and 25, 2004. All 12 parties were represented by counsel and they all agreed: (1) that any alleged injuries to Mr. Schuchardt occurred at a martime situs and while he was employed in a maritime status, (2) that there is no evidence that Mr. Schuchardt's death was not hastened by his asbestosis, (3) that the claimant is the widow of Mr. Schuchardt and entitled to survivor's

benefits under Section 9 of the Longshore Act if there is a valid claim under the Act, and (4) that the appropriate compensation rate for benefits under Section 9 of the Act is $225.32 per week.

Testimony and exhibits[1] introduced during the trial showed that Mr. Schuchardt's shipyard employment began in 1966, when he started working for Zidell Marine (hereinafter "Zidell"), which continued to employ him until June of 1974. CX 14 at 26, CX 13 at 19. He then worked for Willamette Iron and Steel (hereinafter "Willamette") for approximately three months before taking a job with FMC Corp. (hereinafter "FMC") that lasted until November of 1976. CX 14 at 26. From January of 1977 until December of 1979, Mr. Schuchardt worked intermittently for Zidell, FMC, and Dillingham Ship Repair (hereinafter "Dillingham"). CX 14 at 26. During the period between January of 1980 and May of 1984, he worked only for Zidell. CX 14 at 26. In August of 1984, Mr. Schuchardt was employed for four days by Northwest Marine Iron Works (hereinafter "Northwest Marine") and then began working intermittently for Dillingham. CX 14 at 26. The intermittent employment by Dillingham continued from September of 1984 until April of 1987. CX 14 at 26-27. In August of 1987, Mr. Schuchardt again went to work for Northwest Marine and worked intermittently for that employer until the end of March of 1988. CX 14 at 27. From then until December of 1989, he worked intermittently for Northwest Marine and West States, Inc. (hereinafter "West States"). CX 14 at 27-28. Union employment records also show that Mr. Schuchardt's last maritime employer was Zidell, which employed him from April 2, 1990 until April of 1991. ZSX 2 at 12.

On October 10, 1991, Mr. Schuchardt was given a medical examination by Dr. Mark Clark. CX 19. During the examination, Mr. Schuchardt reportedly told Dr. Clark that he had started wearing a mask in the 1970s and felt that he hadn't had "any significant asbestos exposure in the shipyards since the late 1970's." CX 19 at 61. On the basis of x-rays, pulmonary function tests, and the results of a physical examination, Dr. Clark concluded that Mr. Schuchardt had an "[e]xtensive history of asbestos exposure with evidence of asbestosis and asbestos-related pleural changes." CX 19 at 62. On January 27, 1992, Mr. Schuchardt was given an "independent medical examination" by Dr. Gregory Foster. CX 20. During the examination, Mr. Schuchardt told Dr. Foster that his shipyard employment had involved a lot of major ship overhauls which involved tearing out insulation that contained asbestos and that he had worked near insulators and pipe fitters. CX 20 at 64. Dr. Foster also noted that in the mid-1970s Mr. Schuchardt and his co-workers were told to wear masks and areas with asbestos were "roped off." CX 20 at 64. In 1989, Mr. Schuchardt told Dr. Foster, he began working on a new construction project that involved no asbestos exposure. CX 20 at 64. Dr. Foster concluded that Mr. Schuchardt had pulmonary asbestosis. CX 20 at 64.

On January 28, 1992, Mr. Schuchardt was deposed by attorneys for the defendants in a civil action that he had filed against various manufacturers and distributors of asbestos products. CX 15. According to Mr. Schuchardt's deposition testimony, about 20 to 30 percent of his work on ships took place in engine rooms, where the ships' boilers were located. CX 15 at 40. Although he could not remember the names of any of the ships where he had worked, he was

[1] The following abbreviations are used to identify the exhibits: CX for Claimant Exhibits, ZX for self-insured Zidell Exhibits, NWMX for Northwest Marine-SAIF Exhibits, WX for Willamette Iron & Steel –Wausau Exhibits, DX for Dillingham Exhibits, ZSX fro Zidell-SAIF Exhibits, and OX for Oregon Insurance Guaranty Association Exhibits.

able to recall that when he repaired boilers, his work involved "welding and fitting" and each job would take from 20 to 40 hours to complete. CX 15 at 40, 46. He also remembered that when he repaired boilers he would sometimes have to tear out firebricks from around the boilers and he acknowledged that the bricks could be very dusty if cut or broken. ZSX 6 at 98-99, CX 15 at 41-42. He further testified that when he performed these jobs he knew that the firebricks and the surrounding high temperature cement contained asbestos. CX 15 at 44. In addition, he recalled that he began working on Foster Wheeler brand boilers in the 1960s and that he saw Foster Wheeler boilers on "almost all" of the ships on which he worked. CX 15 at 45-46. When Mr. Schuchardt was asked when he last worked in a Foster Wheeler boiler, he replied, "[w]ell, it would have probably been in about maybe '86 or '87." CX 15 at 46. However, later during the same deposition, Mr. Schuchardt was asked when he was last exposed to asbestos and he answered, "[e]arly to mid '70s, I would think, maybe '74. I'm not really sure." CX 15 at 49. At no time during the deposition did Mr. Schuchardt identify any specific shipyard employer who had exposed him to asbestos or give the name of the shipyard where he had last worked on a Foster Wheeler boiler. In February of 1996, Mr. Schuchardt had a "small" heart attack, and in April of 1999 Dr. Michael T. Norris, Mr. Schuchardt's primary care physician, described Mr. Schuchardt's lung disease as being "severe." CX 24 at 84, 87.

On August 23, 2000, Mr. Schuchardt died as a result of a myocardial infarction. CX 25. However, according to a statement signed by Dr. Norris on March 29, 2001, there is a reasonable medical probability that Mr. Schuchardt's pulmonary asbestosis hastened his death. CX 26 at 102. Mr. Schuchardt's death certificate also indicates that pulmonary asbestosis contributed to his death. CX 25. On August 7, 2003, Dr. Carl A. Brodkin, a board-certified specialist in occupational medicine, signed an affidavit in which he concurred with the opinion of Dr. Norris that Mr. Schuchardt's death was hastened by his pulmonary asbestosis. CX 27. In addition, Dr. Brodkin opined that "[g]iven sufficient latency, all of a worker's occupational exposures to asbestos contribute to causing asbestosis." CX 27 at 105. Dr. Brodkin further opined that "[a]dditonal occupational doses of asbestos throughout the career of a worker contribute substantially to asbestosis even after an initially high exposure to asbestos in the early portions of a worker's career." CX 27 at 105.

The principal purpose of the February 2004 trial was to determine which one of Mr. Schuchardt's various shipyard employers is responsible for the payment of benefits under the so-called "last responsible maritime employer" rule. Under that rule, a single employer may be held liable for the totality of an injured worker's disability or death, even though the disability or death may be attributable to a series of injuries that the worker suffered while working for more than one employer. In such multiple employer situations, the Ninth Circuit has utilized two distinct standards to determine which of an injured worker's employers will be held liable for all of the worker's disability. The first standard applies in cases involving disabilities that are caused by occupational diseases and the second standard applies in cases involving disabilities that result from multiple or cumulative traumas.[2] *Foundation Constructors v.*

[2] Under the standard that applies in traumatic injury cases, liability is based on the evidence concerning the actual cause of a worker's ultimate disability. Thus, if the worker's ultimate disability results from the natural progression of a traumatic injury and would have occurred notwithstanding the subsequent injury or injuries, the employer that

Director, OWCP, 950 F.2d 621, 623-24 (9th Cir. 1991). Because asbestosis is an occupational disease, this case is governed by the first standard. Under the occupational disease standard, the responsible employer is the employer that last exposed a worker to potentially injurious stimuli prior to the date upon which the worker became aware that he or she was suffering from an occupational disease arising from his or her employment. *See Port of Portland v. Director, OWCP*, 932 F.2d 836, 840 (9th Cir. 1991); *Todd Pacific Shipyards Corp. v. Director*, OWCP, 914 F.2d 1317 (9th Cir. 1990); *Lustig v. U.S. Department of Labor*, 881 F.2d 593, 596 (9th Cir. 1989); *Kelaita v. Director, OWCP*, 799 F.2d 1308, 1311 (9th Cir. 1986). It is unnecessary, however, to show that there was an actual causal relationship between the potentially injurious stimuli and the worker's impairment, so long as it is at least theoretically possible for the potentially injurious stimuli to have contributed to the impairment.[3] *Port of Portland, supra,* at 840-41.

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employed the worker on the date of the initial injury is the responsible employer. Alternatively, if the worker's ultimate disability is at least partially the result of a new traumatic injury that aggravated, accelerated, or combined with a prior injury to create the disability, the employer that employed the worker at the time of the new injury is the responsible employer. *Foundation Constructors, supra*, at 624.

[3] Although the precedents governing occupational disease cases do not require proof that the potentially harmful stimuli to which a worker has been exposed actually caused the worker's occupational disease, these decisions do not contemplate that liability will be imposed on a particular employer unless it has first been shown that the employer actually exposed the injured worker to a potentially harmful stimuli that could have at least theoretically caused the worker's injury. For example, in the seminal case of *Traveler's Insurance Co. v. Cardillo*, 225 F.2d 137 (2nd Cir. 1954), the court stated the rule in the following language:

> ... the employer during the last employment *in which claimant was exposed to injurious stimuli*, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the award.

225 F.2d at 145 (emphasis added). Likewise, the Fifth Circuit expressed a similar understanding of the rule when it held:

> Congress intended that *the employer during the last employment in which the claimant was exposed to injurious stimuli*, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising out of his employment, should be liable for the full amount of the award.

Avondale Industries, Inc. v. Director, OWCP, 977 F.2d 186, 190 (5th Cir. 1992) (emphasis added). Similarly, in *Port of Portland v. Director, OWCP (Ronne)*, 932 F.2d 836 (9th Cir. 1991), the court held that the BRB had erred in assigning last responsible employer liability to an employer that could not have even theoretically contributed to a claimant's work-related hearing loss. The court explained its decision as follows:

> We agree with the Board that *Cordero* does not require a demonstrated medical causal relationship between claimant's exposure and his occupational disease. But *Cordero* does require that that liability rest on the employer covering the risk at the time of the most recent injurious exposure *related* to the disability….
>
> We reject any reading of *Cardill*o that would impose liability on an employer who *could not,* even theoretically, have contributed to the causation of the disability. Our emphasis on rational connection and causal relation in *Cordero* militates against such a reading.

932 F.2d at 840-41 (emphasis original).

During the trial of this case, the claimant invoked the provisions of subsection 20(a) of the Longshore Act against all of the above-captioned defendants. Pursuant to long-standing interpretations of subsection 20(a), a Longshore Act claimant is presumed to be entitled to compensation under the Act if the claimant produces evidence indicating: (1) that he or she suffered some harm or pain, and (2) that working conditions existed or an accident occurred that could have caused the harm or pain. *See Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Under the decision of the United States Court of Appeals for the District of Columbia in *Brown v. I.T.T./Continental Baking Co*., 921 F.2d 289 (D.C. Cir. 1990), a claimant is entitled to invoke the subsection 20(a) presumption if he or she adduces only "*some* evidence tending to establish" each of the two prerequisites and is not required to prove the prerequisites by a preponderance of the evidence. 921 F.2d at 296, n.6 (emphasis in original).[4] Once these two requirements have been satisfied, the relevant employer is given the burden of presenting "substantial evidence" to counter the presumed relationship between the claimant's impairment and its alleged cause. *Dower v. General Dynamics Corp*., 14 BRBS 324 (1981). If the presumption is rebutted, it falls out of the case and the administrative law judge must weigh all of the evidence and resolve the issue based on the record as a whole. *Hislop v. Marine Terminals Corp.*, 14 BRBS 927 (1982). Under the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994), the ultimate burden of proof then rests on the claimant. *See also Holmes v. Universal Maritime Services Corp*., 29 BRBS 18, 21 (1995).

A Decision and Order awarding benefits to the claimant was issued by the undersigned administrative law judge on September 14, 2004. After setting forth a summary of the relevant evidence, the decision concluded: (1) that Mr. Schuchardt's 1992 deposition testimony that he had "probably" or "maybe" last worked on a Foster Wheeler boiler in 1986 or 1987 is probative enough to constitute "some evidence" sufficient to invoke a subsection 20(a) presumption that Mr. Schuchardt's death was causally related to his employment by the two companies that had employed him during various parts of 1986 and 1987: Dillingham and Northwest Marine, (2) that there was insufficient evidence in the record to support an inference that either West States, which had employed Mr. Schuchardt in 1988 and 1989, or Zidell, which had employed Mr. Schuchardt in 1990 and 1991, had exposed Mr. Schuchardt to asbestos during those time periods, (3) that a preponderance of the evidence showed that Mr. Schuchardt had not been exposed to asbestos while engaged in boiler repair work for Northwest Marine, and (4) that a preponderance of the evidence showed that Mr. Schuchardt had been exposed to asbestos when employed by Dillingham in 1986 or 1987 to repair a Foster Wheeler boiler. It was therefore concluded that Dillingham was the last responsible employer.

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[4] In its decision in *McAllister v. Lockheed Shipbuilding*, 39 BRBS 35 (2005), the BRB asserted that "substantial evidence" is required before a claimant can invoke the subsection 20(a) presumption. 39 BRBS at 39. However, none of the three decisions the BRB cited for this conclusion contain such a holding. Moreover, the BRB decision did not mention the *ITT/Continental Baking* decision. It is also noted that the highest courts in at least three jurisdictions where workers' compensation statutes contain provisions essentially identical to subsection 20(a) have all held that only "some evidence" is needed in order to invoke the presumption. *See Lorchitsky v. Gotham Folding Box Co*., 230 N.Y. 8, 128 N.E. 899 (N. Y. 1920); *Gillispie v. B & B Foodland*, 881 P.2d 1106 (Alaska 1994); *Ferreira v. District of Columbia Dep't of Employment Services*, 531 A.2d 651 (D.C. 1987).

DECISION AND ORDER OF THE BENEFITS REVIEW BOARD

In a Decision and Order issued on September 29, 2005, the Benefits Review Board ("BRB") vacated the finding that Dillingham is the responsible employer and remanded the matter for further consideration consistent with its opinion. In its decision, the BRB also asserted that none of the 12 parties in this proceeding had shown a proper understanding of the application of subsection 20(a) in cases involving multiple employers and that they had all "erroneously conflate[d] the issue of responsible employer and causation." BRB Decision and Order at 4. The decision then explained that in cases involving last responsible employer issues, it is improper to invoke the subsection 20(a) presumption against particular employers, as had been done in this case. Rather, the BRB reiterated its holding in a similar case that it had issued only one month earlier, *McAllister v. Lockheed Shipbuilding*, 39 BRBS 35 (2005):

> The causation determination is made without reference to a particular covered employer. That is, the Section 20(a) presumption is not invoked against a particular employer; instead, the evidence of record must be considered to determine if the evidence is sufficient to invoke the Section 20(a) presumption *on* behalf of a claimant. [5]

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[5] Although the BRB is entitled to express its disappointment with the parties' alleged misinterpretation of subsection 20(a), it should be recognized that the BRB's determination in the *McAllister* case that subsection 20(a) cannot be invoked against specific employers could not reasonably be foreseen from the BRB's decisions in either of the two precedents that the *McAllister* decision cited for this principle: *Zeringue v. McDermott, Inc*., 32 BRBS 275 (1998), and *Lins v. Ingalls Shipbuilding, Inc*., 26 BRBS 62 (1992). Although both of these decisions concern the application of the subsection 20(a) presumption, neither of these decisions holds or even implies that subsection 20(a) cannot be invoked against a particular employer.

In the *Zeringue* decision, an administrative law judge invoked the subsection 20(a) presumption based on a claimant's testimony that he had been exposed to loud noise while employed by McDermott and the administrative law judge then found that McDermott was required to compensate the claimant for a 45.3 percent binaural hearing loss. On appeal, McDermott, which was the claimant's last employer, contended, *inter alia*, that the claimant's hearing loss existed when he worked for a prior employer. The BRB held that this contention was irrelevant because under the last responsible employer rule set forth in *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2nd Cir. 1955), in occupational disease cases the employer responsible for the payment of benefits is simply the last maritime employer to expose an employee to injurious stimuli prior to the date the employee becomes aware that he is suffering from an occupational disease---a standard that intentionally does not require proof that the exposure to the injurious stimuli actually caused or worsened the occupational disease. The decision does not hold or even imply that the subsection 20(a) presumption cannot be invoked against a particular employer.

In the *Lins* case, the administrative law judge invoked the subsection 20(a) presumption based on defendant Ingalls Shipbuilding's admission that it had exposed the claimant to noise that could have caused a hearing loss. The administrative law judge also found that Ingalls had failed to prove that the claimant had been exposed to potentially injurious noise levels at a subsequent employer and therefore found Ingalls responsible for the claimant's hearing loss. On appeal, Ingalls contended that it should have been allowed to invoke the subsection 20(a) presumption against the subsequent employer but the BRB rejected that contention on the grounds that the subsection 20(a) presumption "is a presumption of compensability which has no bearing on the responsible employer issue." Although this holding does support the BRB's conclusion that the presumption can only be invoked "on behalf of a claimant," it does not in any way indicate that the presumption is "not invoked against a particular employer." Rather, in that case, it appears that the presumption was in fact invoked against Ingalls, but not against the subsequent employer.

BRB Decision and Order at 5.

The BRB's decision then explained that in multiple-employer cases, any of the employers can rebut the subsection 20(a) presumption by producing substantial evidence that a worker's injury or death was not related to or hastened by his employment exposure. BRB Decision and Order at 5. The BRB also noted that "[i]f any of the employers rebuts the presumption, the presumption no longer controls, and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion." BRB Decision and Order at 5. On the other hand, the BRB held, if no employer successfully rebuts the subsection 20(a) presumption:

> Claimant does not bear the burden of proving the responsible employer; rather **each** employer bears the burden of establishing that it is not the responsible employer. *General Ship Service v. Director, OWCP [Barnes]*, 938 F.2d 960, 25 BRBS 22 (CRT) (9th Cir. 1991); *Susoeff v. San Francisco Stevedoring C*o., 19 BRBS 149 (1986); [footnote omitted] *see also Cooper/T Smith Stevedoring Co., Inc. v. Liuzza,* 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002)*; Ramey,* 134 F.3d 954*,* 31 BRBS 206(CRT)*; Avondale Industries, Inc. v. Director, OWCP [Cuevas],* 977 F.2d 186, 26 BRBS 111(CRT) (5th Cir. 1992)*.*

BRB Decision and Order at 5-6 (emphasis added). According to the Board's decision, in such circumstances an individual employer can meet its burden of showing that it is not a responsible employer if it demonstrates "either that the employee was not exposed to injurious stimuli in sufficient quantities at its facility to have the potential to cause his disease or that the employee was exposed to injurious stimuli while working for a subsequent covered employer."[6] BRB Decision and Order at 5.

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[6] It is noted, however, that none of the five precedents cited by the BRB support the Board's assertion that once the subsection 20(a) presumption has been successfully invoked to establish a relationship between a worker's condition and the worker's overall employment, **each** defendant "employer bears the burden of establishing it is not the responsible employer." The first decision cited by the BRB, *General Ship Services v. Director, OWCP*, 938 F.2d 960 (9th Cir. 1991), agrees with the BRB's holding in *Susoeff v. San Francisco Stevedoring*, 19 BRBS 149 (1986), that a maritime employer seeking to escape liability for an employee's occupational disease may do so by demonstrating that a subsequent maritime employer exposed the employee to potentially injurious stimuli. However, the *General Ship* decision does not in any way suggest that some sort of burden of proof can be imposed on an employer in the absence of at least some evidence that the employer exposed a claimant to potentially harmful stimuli. Rather, the authors of the *General Ship* decision seem to have gone out of their way to indicate that the court was imposing a burden only on those specific employers who had first been shown to have "exposed an employee to injurious stimuli." *See* 938 F.2d at 961-62 (passages in the decision noting: (1) that an administrative law judge had determined that *both* the employers in that case had exposed the decedent to asbestos, (2) that the BRB's *Susoeff* decision holds that "an *employer who has exposed an employee to injurious stimuli* can escape liability by demonstrating that the employee was also exposed to injurious stimuli" while working for a subsequent maritime employer, and (3) that "[p]lacing the burden of proof on employer *who has exposed the claimant to harm* ensures that the claimant will recover for his injuries.")(emphasis added).

Likewise, the second precedent cited by the BRB, the Ninth Circuit's *Susoeff* decision*,* also fails to contain any language that would support a conclusion that some sort of burden of producing evidence can be placed on employers that have not in some way been specifically connected to a worker's exposure to harmful substances. Although the *Susoeff* decision does hold that a claimant who has successfully shown that a maritime employer has exposed him or her to harmful stimuli has met his or her burden of proof and does not have the additional burden of

After setting forth the foregoing standards for applying subsection 20(a) in multiple employer cases, the BRB's Decision and Order goes on to hold that in this case it was an error to have invoked the subsection 20(a) presumption against particular employers (i.e., Dillingham and Northwest Marine) "in order to determine which of them is liable." Decision and Order at 6. The Board then determined "as a matter of law" that the claimant has established that Mr. Schuchardt's death "was related to his asbestos exposure during the course of his employment as a welder/fitter" and that the claimant has therefore "established her entitlement to benefits under the Act." Decision and Order at 6. Further, the BRB held, the burden of proof is now on "each of the decedent's covered employers to establish that it is not the responsible employer without the benefit of the subsection 20(a) presumption." Decision and Order at 6.

The BRB also considered Dillingham's contention that there is a lack of substantial evidence to support the finding that Dillingham is the last responsible employer. After considering this contention, the BRB concluded that "the administrative law judge [decision] fully addressed the evidence establishing that decedent last worked inside a Foster Wheeler boiler in 1986 or 1987." However, the BRB held, the decision "did not address whether Dillingham established that the decedent was not exposed to injurious stimuli in sufficient quantities inside the boiler to have the potential to cause asbestosis, a finding that is necessary to conclude that Dillingham is not the responsible employer." Decision and Order at 8. In addition, the Board's decision concluded that the initial decision's use of terms such as "suggest" "seems to indicate" and "implies" amounted to an "inconclusive weighing of the evidence" that made it necessary to vacate the responsible employer determination. Finally, the Board's decision concluded with an admonishment that the responsible employer issue be reconsidered in light of the "principle that each employer bears the burden of proving it is not liable for claimant's benefits without reference to the Section 20(a) presumption." Decision and Order at 8.

CONTENTIONS OF THE PARTIES CONCERNING THE REMANDED ISSUES

After the record in this case was received by the Office of Administrative Law Judges, all parties were given the opportunity to file briefs addressing the issues remanded by the BRB. In their responses, all of the responding parties except Dillingham contended that Dillingham is the last responsible employer. In contrast, Dillingham argued that the last responsible employer is Northwest Marine. In addition, self-insured Zidell contended that the BRB's decision to allow

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proving that "no other employer" is liable, such a holding does not in any way mean or even suggest that each of the claimant's subsequent employers has a burden of showing that it is not the responsible employer. Indeed, as the court in the *General Ship* decision points out, the *Susoeff* decision imposes such a burden only on subsequent employers that have "exposed an employee to injurious stimuli." Similarly, none of the other three decisions cited in the BRB's decision holds otherwise. Instead, each of those decisions merely restates the well-settled principle that if an injured worker can show that he or she was exposed to harmful stimuli by an employer, that employer then has the burden of showing that the stimuli did not cause the harm or that the worker was also exposed to the injurious stimuli by a subsequent maritime employer. None of these decisions in any way holds, as does the BRB on page 5 of its decision in this case, that if an injured worker shows exposure to injurious stimuli by any maritime employer, then "each" of the other defendant employers in a case has the burden of showing that it did not expose the worker to injurious stimuli. *See Cooper/T Smith Stevedoring Co., Inc. v. Liuzza,* 293 F.3d 741 (5th Cir. 2002)*; Ramey,* 134 F.3d 954 (9th Cir. 1998)*; Avondale Industries, Inc. v. Director, OWCP (Cuevas),* 977 F.2d 186 (5th Cir. 1992).

consideration of Mr. Schuchardt's 1992 deposition testimony is inconsistent with the Supreme Court's holding in *Richardson v. Perales*, 402 U.S. 389 (1971).[7] Self-insured Zidell further argued that insofar as the BRB's new responsible employer standard shifts the burden of persuasion to defendants, it conflicts with the interpretation of the Administrative Procedure Act set forth in the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994). [8]

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[7] In particular, self-insured Zidell contends that Mr. Schuchardt's deposition testimony should not have been admitted into evidence because none of the parties in this proceeding had an opportunity to cross-examine Mr. Schuchardt concerning his testimony. However, under subsection 23(a) of the Longshore Act declarations of deceased workers concerning an "injury" may be received into evidence, even though such statements are hearsay. Moreover, the BRB has held that, as used in subsection 23(a), the term "injury" includes both the "working conditions" element and the "harm" element of a prima facie case. *See McAllister v. Lockheed Shipbuilding*, 39 BRBS 35 at 41-42 (2005).

[8] In the *Greenwich Collieries* decision, the Supreme Court overruled the BRB's so-called "true doubt" rule and held that the burden of persuasion in Longshore Act proceedings rests on claimants. The BRB's decisions in this case and the *McAllister* case seem to assume that subsection 20(a) of the Longshore Act can be used to shift this burden of persuasion to **every** defendant employer in an occupational disease case if the evidence of a worker's exposure to a potentially harmful substance by **even one** of the worker's former employers is not rebutted by substantial evidence. The basis for this ruling seems to be the BRB's apparent belief that the failure of defendant employers to rebut evidence that one or more the employers exposed a worker to potentially harmful stimuli is sufficient to justify a presumption that every defendant employer exposed the worker to such stimuli. However, this aspect of the BRB's decision seems to be inconsistent with the principle that "the circumstances giving rise to [a] presumption must make it more likely than not that the presumed fact exists." *See National Mining Ass'n v. Babbitt*, 172 F.3d 906, 910-12 (D.C. Cir. 1999) (holding that an Interior Department regulation establishing a rebuttable presumption that owners of underground mines would be responsible for earth-movement damage to commercial buildings or residential dwellings if such structures were located within a 30-degree "angle of the draw" of an underground mine was impermissible because the Interior Department failed to show that the circumstances giving rise to the presumption "make it more likely than not that the presumed fact exists," thereby indicating that there was no "sound and rational connection between the proved and inferred facts"). The requirement that there be a "rational connection" between causation and the imposition of liability has also been recognized by the Ninth Circuit in its application of the last responsible employer rule. The most relevant of these Ninth Circuit decisions is *Cordero v. Triple A Machine Shop*, 580 F.2d 1331 (9th Cir. 1978). In *Cordero*, the court found that liability had properly been assigned to Triple A Machine Shop only because "there [was] a rational connection between the length of employment proven and the contribution to the development and aggravation of the disease."

It is difficult to conclude that the BRB's new interpretation of the subsection 20(a) presumption could withstand such "rational-connection" scrutiny. Indeed, it would seems to be less than rational to presume that all of an injured shipyard or longshore worker's employers have exposed the worker to potentially injurious stimuli based solely on evidence indicating that some other employer or employers had exposed the worker to such stimuli. The seeming lack of a rational connection is even more apparent when it is recognized that by the time most former shipyard workers become aware of the fact that they have acquired an asbestos-related disease, many years have elapsed and the workers have been employed at many different shipyards. Likewise, longshore workers (who are also covered by the last employer rule) often change employers every few days and in the course of a single year might work for every single stevedoring company in a particular port. Moreover, many longshore workers perform many different types of jobs in a variety of different work environments. For these reasons, it seems doubtful that the evidence showing that one employer has exposed a worker to harmful stimuli would "make it more likely than not" all of the worker's other maritime employers have also exposed the worker to the same harmful stimuli. Indeed, any such inference would seem to be somewhat farfetched.

ANALYSIS

As previously explained, the BRB's Decision and Order holds that if none of a maritime worker's former employers is able to rebut a subsection 20(a) presumption that the worker's occupational disease is causally related to the worker's overall maritime employment, each of the employers has the burden of establishing that it is not the responsible employer by demonstrating "either that the employee was not exposed to injurious stimuli in sufficient quantities at its facility to have the potential to cause his disease or that the employee was exposed to injurious stimuli while working for a subsequent covered employer." BRB Decision and Order at 5. The BRB decision further holds that in this particular case the subsection 20(a) presumption has been properly invoked and that none of the defendant employers has successfully rebutted the presumption. Hence, the principal issue remaining to be resolved is the question of which, if any, of Mr. Schuchardt's former maritime employers is the employer responsible for the payment of Longshore Act benefits.

As intimated in the BRB's decision in the *McAllister* case, this process should begin by seeking to determining whether a worker's last maritime employer has met its burden of showing that it did not expose the worker to harmful stimuli in quantities sufficient to have potentially caused the worker's death or impairment. If it is determined that the last employer did expose the worker to such stimuli, the last employer is responsible for the payment of benefits. Alternatively, if the last employer proves that it did not expose the worker to potentially harmful stimuli, it must then be determined whether the worker was exposed to sufficient quantities of the potentially harmful stimuli by the next-to-last maritime employer. If the next-to-last employer satisfies its burden of proof, the process continues in reverse order of employment through each of the worker's former maritime employers, until one of the employers fails to meet its burden of proof. Although the BRB has not specified what evidentiary standard should be used when determining whether a former employer has satisfied its burden, the BRB's use of the term "burden of proof" implies that the BRB believes that a "preponderance of the evidence" standard should be applied.

As previously explained, the BRB has determined that the subsection 20(a) presumption can be invoked against all of a worker's former maritime employers if none of the employers has successfully rebutted evidence showing that the worker was exposed to potentially harmful stimuli by any one of the worker's former maritime employers. Hence, in some cases there will be no specific evidence or allegations linking particular employers to the worker's exposure to potentially harmful stimuli. For example, if a worker were to successfully establish a subsection 20(a) presumption based on evidence that only one of three former maritime employers had exposed him or her to asbestos, the remaining two employers would still be required to prove that they did not expose the worker to asbestos, even though none of the parties submitted any evidence that such exposure ever occurred. Thus, under the BRB's decisions in this case and *McAllister*, such employers will have a burden of "proving a negative," i.e., that they did not in fact expose the worker to such stimuli.

The BRB has not yet provided any guidelines for evaluating the kinds of evidence that such employers might submit in their efforts to disprove what is, in effect, a presumption that

they did expose the worker to potentially injurious stimuli. In the absence of such guidance, it is assumed that an administrative law judge must consider whatever evidence logically indicates that such an employer did expose the worker to potentially injurious stimuli and then weigh that evidence against any other evidence in the record that would logically indicate that such exposure did not occur. If this weighing process then indicates that it is more likely than not that a particular employer did expose the worker to potentially harmful stimuli, the employer would have to be found liable for the payment of benefits. Conversely, if the weight of the evidence indicates that it is more likely than not that the employer did not expose the worker to such stimuli, the employer would not be liable for the payment of benefits. Finally, if there is no probative evidence for either possibility, or, if the evidence is equally balanced, it would have to be concluded that the employer had failed to meet its burden of proof under the *McAllister* decision and is therefore liable for the payment of benefits.

In this case, Mr. Schuchardt's last maritime employer was Zidell, which employed him from April of 1990 until April of 1991. Although Zidell is a defendant employer in this proceeding based on its employment of Mr. Schuchardt at various times in the 1960s, 1970s, 1980s and 1990s, the insurance company that provided Longshore Act coverage for Zidell during 1990 and 1991 (AIG/National Union Fire Insurance) was dismissed as a party on August 1, 2003 in response to the insurer's motion for summary decision. Review of the order granting that motion shows that the insurer was dismissed without prejudice based on the transcript of Mr. Schuchardt's 1992 deposition. As previously explained, during that deposition Mr. Schuchardt testified that he thought he had last been exposed to asbestos in the 1970s. However, he also acknowledged that the firebricks and high temperature cement used in ships' boilers contain asbestos and that he thought he had last worked in a Foster Wheeler boiler in about 1986 or 1987. Because the decision to grant the insurer's motion for summary decision was based on the assumption that the claimant had the burden of showing which particular employers had exposed Mr. Schuchardt to asbestos, the decision to dismiss the insurer has now been reconsidered in light of the BRB's recent holding that the claimant does not have such a burden and that the burden of proof is instead on each individual employer if, as in this case, no defendant has successfully rebutted the subsection 20(a) presumption.

During the reconsideration, all relevant evidence was weighed for the purpose of determining whether a preponderance of the evidence shows that Mr. Schuchardt was **not** exposed to potentially harmful levels of asbestos when he worked for Zidell in 1990 and 1991. The reconsideration revealed that there is no specific evidence indicating that Mr. Schuchardt was exposed to asbestos while employed by Zidell during 1990 and 1991 and that, instead, the relevant evidence tends to affirmatively show that he was not exposed to asbestos during that period. For example, as noted in the initial decision, testimony received during the trial showed that Zidell engaged only in the construction of new barges after 1990 and that the new barges did not have any motors, engines, boilers, or sprayed-on insulation (testimony of Gene Barger at Tr. 197-99). Likewise, Mr. Schuchardt's 1992 deposition testimony that he did not believe he had been exposed to asbestos since the 1970s and that he thought he had last worked in a Foster Wheeler boiler in about 1986 or 1987 also constitutes some affirmative evidence that Mr. Schuchardt did not have any reason to believe that he had been exposed to asbestos while working for Zidell in 1990 and 1991. Accordingly, it has been concluded that the preponderance

of the evidence shows that Zidell did not expose Mr. Schuchardt to potentially harmful levels of asbestos in 1990 or 1991.

Mr. Schuchardt's next-to-last employer was West States, which employed him on seven occasions in 1988 and 1989. West States and its two insurers during that period were dismissed as defendants in orders dated June 3, 2003 and July 2, 2003. These orders show that West States and its insurers were dismissed without prejudice based on Mr. Schuchardt's 1992 deposition testimony that he thought he had last been exposed to asbestos in the 1970s and believed that he had last worked in a Foster Wheeler boiler in about 1986 or 1987. Like the order dismissing Zidell's insurer, the orders dismissing West States and its insurers have been reconsidered in light of the new legal standard set forth in the BRB's decision. In particular, all the relevant evidence was re-weighed for the purpose of determining whether a preponderance of the evidence shows that Mr. Schuchardt was **not** exposed to potentially harmful levels of asbestos when he worked for West States in 1988 and 1989. The reconsideration revealed that although Dr. Cohen testified that Mr. Schuchardt could have been exposed to asbestos if he worked in or near boiler rooms on Navy vessels or aboard steam-propelled ships that had not undergone asbestos abatement, there is no evidence indicating that Mr. Schuchardt worked in either kind of environment when employed by West States. Indeed, there is no evidence that Mr. Schuchardt even worked on board any kind of ship during the course of his employment by West States. In comparison, Mr. Schuchardt's 1992 deposition testimony that he did not believe he had been exposed to asbestos since the 1970s and that he thought he had last worked in a Foster Wheeler boiler in about 1986 or 1987 constitutes some relatively weak, but nonetheless affirmative evidence that he was not exposed to asbestos while working for West States. Accordingly, it has been concluded that the preponderance of the understandably skimpy evidence shows that West States did not expose Mr. Schuchardt to potentially harmful levels of asbestos when it employed him in 1988 and 1989.

Mr. Schuchardt's third-to-last employer was Northwest Marine, which employed him intermittently from August of 1987 until March of 1988. Because Mr. Schuchardt's 1992 deposition testimony indicated that he might have last been exposed to asbestos when he worked on a Foster Wheeler boiler in about 1986 or 1987, much of the evidence presented by Northwest Marine was offered for the purpose of establishing that it had not employed Mr. Schuchardt to repair a Foster Wheeler boiler during that time period. Most significantly, Northwest Marine presented testimony by a former safety manager who testified that since 1975 Northwest Marine has "contracted out" all boiler repair work. Tr. at 391-92 (testimony of John Flynn). This testimony ultimately became the basis for the initial decision's conclusion that Northwest Marine had rebutted the subsection 20(a) presumption and that Mr. Schuchardt's fourth-to-last employer, Dillingham, must have been the defendant that had employed him to repair the Foster Wheeler boiler. That factual conclusion seems to have been affirmed in the BRB's decision of September 29, 2005.

After the BRB remanded this matter for reconsideration consistent with the Board's new standard for identifying last responsible employers, Dillingham correctly pointed out that this new standard places the burden on Northwest Marine to establish by a preponderance of the evidence that it did **not** expose Mr. Schuchardt to potentially harmful levels of asbestos or that it was not the last maritime employer to have exposed him to such levels of asbestos. In addition,

Dillingham argues that Northwest Marine has not met this burden. In particular, Dillingham points out that merely showing that there is "no evidence" of asbestos exposure is insufficient to meet an employer's burden of proof under the BRB's new standard. Dillingham further argues that even if Mr. Schuchardt did not perform any boiler repairs for Northwest Marine, he nonetheless could have been exposed to asbestos in various other ways during the course of his employment by Northwest Marine. For example, Dillingham argues that Mr. Schuchardt could have been exposed to potentially harmful levels of asbestos when Northwest Marine employed him to work on board the cruise ship *Rotterdam* in 1989 or if Mr. Schuchardt performed any work on board Navy vessels that were repaired at Northwest Marine.

Review of the evidence concerning Northwest Marine's possible liability indicates that the company performed repair work on Navy vessels that, according to Dr. Cohen's testimony, would have contained asbestos if they had not undergone asbestos abatement programs. As well, there is evidence that Northwest Marine also repaired civilian vessels and Dr. Cohen's testimony indicates that there would have been asbestos on board such civilian vessels if they used steam propulsion systems. However, Mr. Schuchardt's employment records do not show the names of any of the vessels on which he worked and, as a result, the only evidence identifying specific vessels is testimony from the claimant indicating that Mr. Schuchardt had said he worked on board the *Rotterdam* while employed by Northwest Marine in 1989. In addition, the claimant's testimony indicates that Mr. Schuchardt also said that his work on the *Rotterdam* had been "down inside" and that it was one of the "dirtiest jobs" he had ever performed. Tr. at 102 (testimony of the claimant). Dillingham contends that the combination the foregoing evidence concerning Mr. Schuchardt's work for Northwest Marine is by itself sufficient to warrant an inference that Northwest Marine exposed Mr. Schuchardt to asbestos. In contrast, Northwest Marine contends that no such inference is warranted.

After considering the foregoing arguments, it has been concluded that there is some circumstantial evidence is that Mr. Schuchardt may have been exposed to asbestos while working for Northwest Marine, but that such evidence is very weak. For instance, although there is unrebutted evidence that Mr. Schuchardt worked on board the *Rotterdam* in 1989*,* there is no evidence in the record about the *Rotterdam*'s propulsion system or its date of construction. Nor is there any evidence on whether the ship had undergone asbestos abatement to ensure the safety of cruise passengers. Although there is credible evidence that Mr. Schuchardt did tell the claimant that his work on the *Rotterdam* was one of the "dirtiest" jobs he had ever performed, there are so many sources of dirt and grime on board ships that the mere fact that a job was "dirty" does not logically imply that it involved exposure to asbestos. Moreover, Mr. Schuchardt's failure to even mention the *Rotterdam* during his 1992 deposition concerning his history of asbestos exposure is some evidence that he did not have any reason to believe that he had been exposed to asbestos while working on the *Rotterdam*. Likewise, although it is possible and even probable that Mr. Schuchardt worked on other ships while employed by Northwest Marine, there is no evidence indicating the names of these ships, the kinds of propulsion systems that they used, when they were constructed, or what kind of work Mr. Schuchardt did when he was aboard those vessels. In sum, the evidence that Mr. Schuchardt was exposed to asbestos while working for Northwest Marine is highly attenuated and conjectural. However, the evidence that Mr. Schuchardt was **not** exposed to asbestos while employed by Northwest Marine is also weak. In fact, this evidence is composed solely of Mr. Schuchardt's deposition testimony

that he thought he was last exposed to asbestos in the 1970s and that he thought he had last worked in a Foster Wheeler boiler in about 1986 or 1987. Although Mr. Schuchardt plainly knew more than anybody else about where he had worked and what could be observed in his work environments, he was not an expert on asbestos and therefore may have been unknowingly exposed to asbestos on many occasions. Hence, his testimony is of limited probative value. However, in the final analysis it has been concluded that Mr. Schuchardt's testimony is slightly more probative than the attenuated circumstantial evidence that Mr. Schuchardt may have been exposed to asbestos while employed by Northwest Marine. Hence, it has been concluded that the preponderance of this record's admittedly sketchy evidence indicates that Northwest Marine did not expose Mr. Schuchardt to asbestos.

As previously explained, Mr. Schuchardt's fourth-to-last employer was Dillingham. The BRB has already affirmed the finding that Mr. Schuchardt was employed by Dillingham when he last worked in a Foster Wheeler boiler. However, as already explained, the BRB also determined that the initial decision failed to adequately address the question of "whether Dillingham established that the decedent was not exposed to injurious stimuli in sufficient quantities inside the boiler to have the potential to cause asbestosis." BRB Decision and Order at 8. In a brief filed on March 7, 2006, Dillingham presented two arguments to support its contention that it has met this burden.[9]

Dillingham's first argument is the contention that there is insufficient evidence in the record to prove that Mr. Schuchardt ever worked inside a Foster Wheeler boiler while employed by Dillingham. As support for this assertion, Dillingham accurately points out that the initial decision's determination that Mr. Schuchardt was employed by Dillingham when he last worked inside a Foster Wheeler boiler was not based on a preponderance of the evidence standard, but was instead based on the "some evidence" standard used by claimants when invoking the subsection 20(a) presumption. Further, Dillingham contends that Mr. Schuchardt's deposition testimony "is too internally inconsistent and equivocal to support a finding of fact that he worked in a Foster Wheeler boiler" for Dillingham or even Northwest Marine in 1986 or 1987. This latter argument, however, is unconvincing. Although Dillingham correctly notes that there is a degree of inconsistency and equivocation in Mr. Schuchardt's testimony, Dillingham is not persuasive in arguing that Mr. Schuchardt's testimony is too inconsistent and equivocal to support a finding that he worked in a Foster Wheeler boiler while employed by Dillingham. In fact, the only apparent reason for doubting the accuracy of Mr. Schuchardt's testimony about the year he last worked in a Foster Wheeler boiler is his use of the words "probably" and "about maybe" before answering "'86 or '87." While the use of these qualifying words does convey a lack of certainty, they are not so equivocal that Mr. Schuchardt's testimony on this issue has absolutely no evidentiary value. It is also noted that Dillingham was Mr. Schuchardt's sole

[9] Dillingham has not argued or attempted to prove that Mr. Schuchardt used any sort of protective gear that would have prevented him from being exposed to potentially harmful levels of asbestos while working on the Foster Wheeler boiler. Although there is some evidence that Mr. Schuchardt might have in fact worn protective masks on some occasions when working around asbestos, during his deposition Mr. Schuchardt testified that he did not wear at respirator while welding. CX 19 at 61, CX 20 at 64 (reports of Dr. Clark and Dr. Foster), ZSX 6 at 64, 180 (deposition testimony of Mr. Schuchardt). Hence, it is concluded that Dillingham could not have proven that Mr. Schuchardt did in fact use any breathing apparatus that would have prevented him from inhaling potentially harmful levels of asbestos when working in the boiler.

maritime employer from September of 1984 until April of 1987. Hence, even if Mr. Schuchardt had last worked in a Foster Wheeler boiler as long ago as September of 1984, his employer would have still been Dillingham. Moreover, the record further shows that during the three and one-half years between September of 1984 and April 1, 1988, Mr. Schuchardt worked only for Dillingham or Northwest Marine.

Dillingham's second argument is the contention that even if Mr. Schuchardt had worked on a Foster Wheeler boiler for Dillingham, there is no evidence that he was exposed to asbestos while working in the boiler and therefore no evidence that he was exposed to a quantity of asbestos large enough to be potentially injurious. In considering this argument, it is important to recognize that Dillingham is not asserting that any asbestos exposure in a Foster Wheeler boiler was below levels that are potentially harmful. Indeed, Dillingham's brief implicitly recognizes that the record this case contains undisputed evidence that **any** amount of asbestos exposure is potentially injurious.[10] Rather, Dillingham is relying on the alternative argument that there has been no showing that there was any asbestos in the Foster Wheeler boiler. This argument, however, is unconvincing because it fails to give any probative value to Mr. Schuchardt's deposition testimony that the firebricks and high-temperature cement inside boilers contain asbestos and that he would sometimes have to tear out the bricks to perform his job. In fact, as previously noted, Mr. Schuchardt also testified that such bricks could be very dusty if broken. By itself, this testimony is some circumstantial evidence that Mr. Schuchardt was exposed to asbestos when he worked in the Foster Wheeler boiler. Even more significantly, one of Dillingham's own trial witnesses, Scott Hernandez, testified that although tests that Dillingham conducted on board the ships it repaired routinely showed asbestos levels below OSHA's permissible exposure level (PEL), the test results also consistently showed some level of asbestos. Tr. at 271 (testimony of Scott Hernandez). Mr. Hernandez also acknowledged that Dillingham was particularly concerned about older boilers on ships because of the possibility that the gaskets, bricks, and mortar in such boilers could contain asbestos. Tr. at 258.

Although the foregoing circumstantial evidence is not especially strong proof of Mr. Schuchardt's exposure to asbestos and might be outweighed by other evidence showing that all asbestos hazards had been removed from the ship in which Mr Schuchardt last repaired a Foster Wheeler boiler or that the particular boiler had never been insulated with products containing asbestos, the only rebuttal to this evidence that Dillingham has been able to offer is the argument that Mr. Schuchart's testimony concerning his possible exposure to asbestos while working inside a Foster Wheeler boiler in 1986 or 1987 is inconsistent with his other testimony that he thought he had last been exposed to asbestos in the 1970s. This argument could be persuasive if there were no logical way to reconcile Mr. Schuchardt's allegedly inconsistent statements. However, it has been concluded that it is more likely than not that Mr. Schuchardt's answer to the question concerning his last exposure to asbestos was intended to reflect only his knowledge of the last time that he **knew** that he was being exposed to asbestos and that he was not

[10] In particular, the record contains an affidavit in which Dr. Brodkin opines that "[g]iven sufficient latency, all of a workers' occupational exposures to asbestos contribute to causing asbestosis." CX 27 at 105. No party even attempted to dispute this opinion and there is no evidence in the record whatsoever to contradict Dr. Brodkin's opinion. Because of this undisputed evidence, the initial decision did not specifically discuss the possibility that Mr. Schuchardt's exposure to asbestos while working in a Foster Wheeler boiler might not have been potentially injurious. However, Dr. Brodkin's opinion was set forth in the Background section of the initial opinion.

attempting to make a statement concerning occasions when he was unsure or unaware of possible asbestos exposure, which would have probably been the case if he had been exposed to asbestos while repairing a boiler. Consideration has also been given to the possibility that Mr. Schuchardt did not remove any fire bricks when he last worked in a Foster Wheeler boiler and thus may not have inhaled any asbestos coming from the bricks or surrounding high-temperature cement. However, there is no evidence in the record that would support any inferences about whether Mr. Schuchardt did or did not remove the fire bricks.

After weighing the foregoing evidence that Mr. Schuchardt was exposed to asbestos inside the Foster Wheeler boiler against the evidence that he was not exposed to asbestos while working in the boiler, it has been concluded that the evidence is so evenly balanced that it cannot be said that there is a preponderance of the evidence in favor of either possible finding. The primary basis for this conclusion is the fact that there is no probative evidence that would warrant any reasonable inferences about whether Mr. Schuchardt did or did not remove fire bricks when he worked in the Foster Wheeler boiler. Because it has been determined that the evidence is in equipoise, it must be further concluded that Dillingham has failed to meet its burden of proving that it did not expose Mr. Schuchardt to asbestos. As a result, Dillinghma must be held liable for the payment of survivor's benefits to the claimant.

ORDER

1. Beginning on August 23, 2000, and for so long as the claimant remains unmarried, Dillingham shall pay the claimant, Bernice Schuchardt, widows' benefits in the amount of $225.32 per week plus such annual adjustments as are required by the provisions of subsection 10(f) of the Longshore Act. If the claimant remarries, such payments will terminate after two years.

2. Dillingham shall reimburse Bernice Schuchardt for $3,000 of the expenses she incurred for the funeral of Mr. Schuchardt.

3. Dillingham shall pay interest on each unpaid installment of compensation from the date such compensation became due at the rates to be determined by the District Director.

4. The District Director shall make all calculations necessary to carry out this order.

5. Counsel for the claimant shall within 20 days of service of this order submit a fully supported application for costs and fees to the counsel for Dillingham. Within 15 days thereafter, the counsel for Dillingham shall provide the claimant's counsel with a written list specifically describing each and every objection to the proposed fees and costs. Within 15 days after receipt of such objections, the claimant's counsel shall verbally discuss each of the objections with the counsel for Dillingham. If the two counsel thereupon agree on an appropriate award of fees and costs they shall file written notification within ten days and shall also provide a statement of the agreed-upon fees and costs.

Alternatively, if the counsel disagree on any of the proposed fees and costs, the claimant's counsel shall within 15 days file a fully documented petition listing those fees and costs which are in dispute and set forth a statement of his position regarding such fees and costs. Such petition shall also specifically identify those fees and costs which have not been disputed by the counsel for Dillingham. The counsel for Dillingham shall have 15 days from the date of service of such application in which to respond. The claimant's counsel shall then have 10 days in which to file a response. No reply to that response will be permitted unless specifically authorized in advance by the undersigned administrative law judge.

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Paul A. Mapes
Administrative Law Judge